

No. 77-19

Supreme Court, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

IN RE BOSTON & PROVIDENCE
RAILROAD CORPORATION,

Debtor,

ARMISTEAD B. ROOD,

Petitioner.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF ALBERT B. WOLFE
& APPENDIX

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August 30, 1977

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BRIEF OF ALBERT B. WOLFE

Albert B. Wolfe of Cambridge, Massachusetts (whose office address is Room 2800, 28 State Street, Boston 02109) hereby responds to the Petition of Armistead B. Rood for a writ of certiorari to the First Circuit.

Respondent Wolfe

As a member of the Development Group of B&P stockholders Mr. Wolfe was a party in the proceedings over the Penn Central trustees' petition of March 30, 1976, on which the district court issued its order now under con-

sideration (Petition, 1a). He was likewise an appellant in the Court of Appeals for the First Circuit in appeal No. 76-1370, in which that Court issued its five orders now under consideration (Petition, 2a *et seq.*). Thus he qualifies as a respondent herein before the Supreme Court.

Respondent Wolfe's interest is not the same as the primary interest set forth in the Petition for Certiorari. He is a representative B&P stockholder. As such he received and now holds certificates of beneficial ownership in the equitable trust of B&P real estate interests ("the B&P equitable charge") that was reserved for liquidation for the benefit of the stockholders as Part Two of their B&P reorganization settlement and was entrusted to the fiduciary management of the Penn Central trustees, all under the district court's B&P plan consummation order and under that court's continuing control.

As a member of the Group which (as fiduciaries) obtained that equitable trust for the stockholders, he has been especially concerned that it receive proper administration. Before 1976 stockholders were disturbed about this, especially because the peculiar arrangement will allow the Penn Central trustees to retain all B&P properties free and clear if not liquidated before 1979. The trustees' petition of March 30, 1976, for distribution of the B&P expense fund to them, coupled with their default in conveying most of their properties to Conrail brought the dissatisfaction to a head. The Development Group (Wolfe *et al.*) joined in objections of other parties that as a matter of provident responsibility the B&P expense fund must be preserved to finance essential protection of the stockholders.

ARGUMENT

Objections to the district court

Such objections were made to the successor district judge by the Shawmut Bank (the corporate indenture trustee for the stockholders): that the transfer to Conrail was a breach of trust in violation of the District Court's consummation order, that Conrail repudiated the trust, and that the Penn Central trustees had renounced obligation to pay Shawmut's expenses.

Such objections were also made by the largest public holder (an investment trust named Dumaines), showing that nobody knew what property was being conveyed to Conrail and which parts would be withheld, and asking to have the expense fund preserved, in view of the "outstanding matters left open under the B&P plan". Dumaines took the only provident position, viz. —

"Dumaines therefore opposes allowance of the Petition for payment of the remaining B&P funds to the Penn Central trustees until such time as all matters relating to sale or transfer of the B&P real estate are finally settled."

The Development Group supported the objections of Shawmut Bank and Dumaines. All filed detailed supporting memoranda and there was a hearing.

The district court's decision

The district judge ignored all objections. He simply instructed distribution of the expense fund to Penn Central free and clear.

Questions to the Court of Appeals

Five parties appealed. Shawmut Bank later dropped its appeal. Respondent is informed that the Bank did not feel justified in incurring further expense of appeal under the circumstances. As Dumaines pointed out [Memorandum in opposition to summary dismissal, p. 6]:

"The reluctance of the Charge Trustee [Shawmut Bank] to act in behalf of . . . [B&P certificate] holders when the debtor's expense fund is not available to it is amply evidenced by the fact that it has withdrawn its appeal to this Court."

By then it was clear that the Penn Central trustees had defaulted seriously under the equitable trust in violation of the B&P consummation decree. The Development Group, supporting the objections of the other appellants, also saw the expense fund as available to help reimburse the B&P stockholders for their damages suffered at Penn Central's hands. The Group's opposition to summary dismissal therefore submitted five questions relative to the administration of the B&P equitable charge (the equitable trust), asking —

1. Whether the B&P expense fund is available to secure effective administration of the equitable trust.
2. Whether the equities necessitate holding the expense fund to protect the stockholders.
3. Whether Penn Central's interest in the fund should pass to the public stockholders in the event of Penn Central's fiduciary default to them.

4. Whether, given the breakdown in the administration of the trust, the district court should exercise equitable supervision, even to the extent of amending the consummation decree.
5. Whether, in the circumstances, the public stockholders should be required to depend on Penn Central to finance their protection.

Two more questions concerned the allowances. A final question sought to invoke a special master. All Questions presented to the Court of Appeals are appended, *infra*.

The appellate court's avoidance

The Court of Appeals had only this to say about the five questions:

"Upon consideration of the Penn Central Trustees' Motion for Summary Disposition, and all the oppositions thereto, the court hereby grants the motions. As to the argument of the Dumaines that an unbroken prior history of reimbursement by the Penn Central is no guarantee of future performance, we can only note that such an argument does not provide any reason to believe that the Penn Central will therefore now refuse reimbursement."

Nothing more. The Court issued summary dismissal, on the ground that the appeals did not present a substantial question. In subsequent orders the Court addressed only the subject of allowances and, although exhorted to do so, did not speak further on the stockholder questions.¹

¹ This is the omission of "vital questions" described in the Petition at page 13 n.

Respondent Wolfe's grievance

In failing to pass on the stockholder questions the Court of Appeals (in the words of Supreme Court Rule 19(b) —

“has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this court's power of supervision.”

Why has this happened? In 1974 Judge Coffin noted that the B&P administration had been in the courts a long time. He used the term “hoary litigation”. Actually the Boston court proceedings were used for years by the prospective purchasers (the old New Haven Railroad managements) to keep the B&P in bondage. But the Court of Appeals is not excused from doing its job.

It has indeed been a long time. But the B&P stockholders still have not received their full consideration under the B&P consummation decree. Their interests run through 1978. Therefore the Court of Appeals should be required to pass on the stockholder questions (as well as to give a reasoned explanation for its threshold barrier on the pending petitions for allowances). Summary process has indeed been abused.

The Supreme Court should not go into the merits of any substantive question below. Justice can be done by simply instructing the court below to do its job.

Respectfully submitted,

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Attorney for Albert B.

Wolfe, respondent

August 30, 1977

ADDITIONAL APPENDIX ITEM

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 76-1370

In the Matter of
BOSTON & PROVIDENCE
RAILROAD CORPORATION,
Debtor

BOSTON & PROVIDENCE RAILROAD
DEVELOPMENT GROUP et al.,
Appellants

APPELLANTS' OPPOSITION TO
PENN CENTRAL MOTION
FOR SUMMARY DISMISSAL

...

October 25, 1976

...

QUESTIONS PRESENTED

A. Relative to the administration
of the B&P equitable charge

Q.1 May the B&P reorganization expense fund established under Paragraph 12 of the B&P plan continue to be held for expense incident to *the second stage* of the B&P reorganization settlement, to secure the effective administration of the equitable charge for all B&P stockholders?

Q.2 Given the District Court's assurance of the Court's continuing supervision, *plus* the power of the Penn Central Trustees to control the sale of the Boston & Providence Railroad on April 1, 1976, their dominance (as holder of the 48 per cent) among the B&P certificate (CCBI) holders, their holding the B&P properties as "grantor" and trustee for the B&P stockholders, their conveyance of the same to Conrail without imposing the trust on Conrail, and Conrail's repudiation of the trust, do not the equities necessitate holding the expense fund to protect the stockholders?

Q.3 If Penn Central has committed a default or breach of fiduciary obligation to the other B&P certificate holders, should not Penn Central's interest in the fund pass to the other holders?

Q.4 The administration of the second stage under the Court's reserved supervision has broken down in the face of unforeseeable troubles brought on by Penn Central. Should not the District Court apply equitable supervision to overcome the failure, perhaps amending the arrangement – and meanwhile holding that expense fund to protect the public stockholders?

Q.5 Under the circumstances, should the public stockholders be required to depend on Penn Central to finance their protection?

B. With respect to the
claims for allowances

Q.6 Should the B&P reorganization expense fund be distributed to the junior claimant (PC) while there are prior claims for allowances still pending?

Q.7 Should Penn Central's petition for the fund be withdrawn because of an agreement with one of the pre-

sent appellants not to molest it pending the settlement of claims for allowances?

C. With respect to disposition
of the present appeals

Q.8 Now that the Interstate Commerce Commission has been eliminated, is it appropriate to remand the proceeding back to the District Court for referral to a special master?
